

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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Court of Appeals, District of Columbia

OCTOBER TERM, 1909.

No. 2058.

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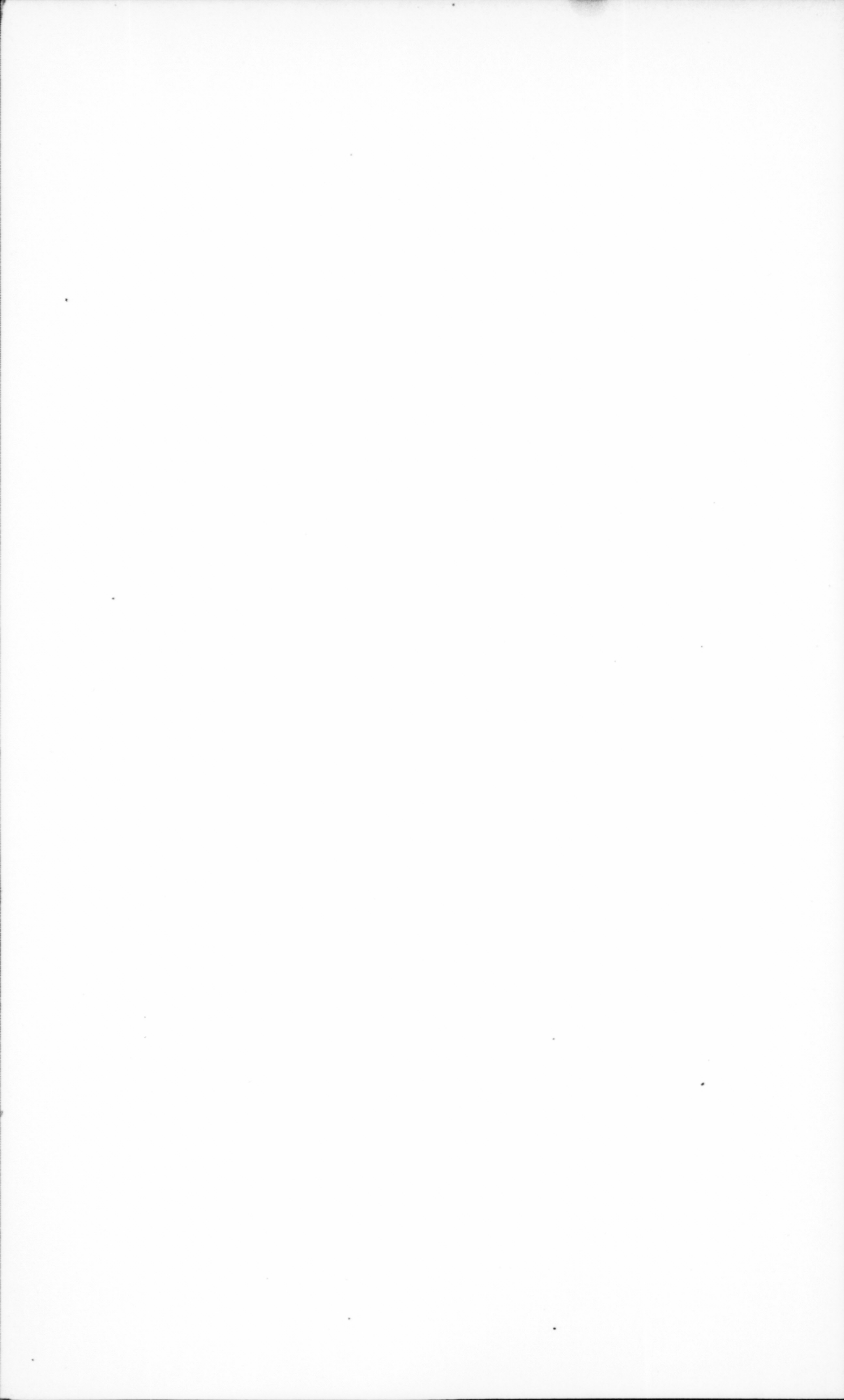
ELMYRA M. GOODMAN, ALFRED GOODMAN, AND MARGARET E. JONES, APPELLANTS,

vs.

ELIZA VIRGINIA WREN, EVA ISABELLA SCHMIDT, FRANCIS AIKEN SCHMIDT, GEORGE F. HAVELL, GUARDIAN *AD LITEM* OF FRANCIS AIKEN SCHMIDT; MARY JANE BOTELER, AND ORLANDO R. BOTELER.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

FILED AUGUST 31, 1909.



COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

OCTOBER TERM, 1909.

No. 2058.

ELMYRA M. GOODMAN, ALFRED GOODMAN, MARGARET
E. JONES, APPELLANTS,

vs.

ELIZA VIRGINIA WREN, EVA ISABELLA SCHMIDT,
FRANCIS AIKEN SCHMIDT, AN INFANT; GEORGE F.
HAVELL, GUARDIAN *AD LITEM* FOR FRANCIS AIKEN
SCHMIDT; MARY JANE BOTELER, ORLANDO R. BOTE-
LER.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

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In the Court of Appeals of the District of Columbia.

No. 2058.

ELMYRA M. GOODMAN et al, Appellants,
vs.
ELIZA VIRGINIA WREN et al.

a The Supreme Court of the District of Columbia.

Equity. No. 28056.

ELMYRA M. GOODMAN and ALFRED GOODMAN, Her Husband, MARGARET E. JONES, Complainants,

vs.

ELIZA VIRGINIA WREN, EVA ISABELLA SCHMIDT, FRANCIS AIKEN Schmidt, an Infant; Mary Jane Boteler, Orlando R. Boteler, Her Husband, Defendants.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed, and proceedings had, in the above-entitled cause, to wit:

1

Bill.

Filed September 23, 1908.

In the Supreme Court of the District of Columbia.

Equity. No. 28056.

ELMYRA M. GOODMAN and ALFRED GOODMAN, Her Husband, MARGARET E. JONES, Complainants,

vs.

ELIZA VIRGINIA WREN, EVA ISABELLA SCHMIDT, FRANCIS AIKEN Schmidt, an Infant; Mary Jane Boteler, Orlando R. Boteler, Her Husband, Defendants.

To the Supreme Court of the District of Columbia, holding an Equity Court:

The bill of complaint of Elmyra M. Goodman and Alfred Goodman, her husband, and Margaret E. Jones respectfully shows unto the Court as follows:

1. That the said complainants are citizens of the United States and residents of the District of Columbia, and that the said Elmyra M. Goodman and Margaret E. Jones bring this suit in their own right as hereinafter alleged and set forth, the said Alfred Goodman being joined as complainant herein for conformity and in such marital rights, if any that he may have, as husband of the said Elmyra M. Goodman in her real estate hereinafter mentioned and described.

2 2. That all of the defendants are citizens of the United States and are residents of the District of Columbia, except Isabella Schmidt and Francis Aiken Schmidt, who reside in the State of Ohio, and are sued in their own right as herein alleged and set forth.

3. Complainants aver that William Miller, late a citizen of the United States, and a resident of the said District of Columbia, on the — day of —, 1849, died at his home in said City and District intestate, leaving him surviving his widow, Mary Miller, and his four infant children born of the said Mary Miller, to wit: Joanna Elizabeth Miller, born in the year 1842, Mary Jane Miller, born in the year 1845, Margaret Ellen Miller, born about the year 1847 and Wilemina Miller, born about the year 1850; that the said Joanna Elizabeth Miller in about the year 1881 died intestate unmarried and without issue, leaving her said sisters as her only heirs at law and next of kin; that the said Wilemina Miller intermarried with Wilton Boteler, and in about the year 1880 she also died intestate, and her interest in the real estate hereinafter mentioned and described descended to her only child and heir at law, Elmyra M. Boteler, who intermarried with Alfred Goodman, and who are parties complainant to this bill; that the said Margaret Ellen Miller intermarried with Edward Jones, now deceased and is party complainant to this bill; that Mary Jane Miller intermarried with Orlando R. Boteler, and they are made parties defendant hereto for the purpose among other things, of having partition of the real estate hereinafter mentioned and described.

3 4. That the said William Miller died seized and possessed of certain real estate in the City of Washington, District of Columbia, and also possessed of certain personal property in said City, and that on the first day of December 1849 letters of administration upon his estate were granted unto the said Mary Miller, his widow, who qualified thereon by taking the oaths and executing the bond prescribed by law in the penalty of Twelve hundred (\$1200.00) dollars before the Orphans' Court in the said District.

5. That afterwards, to wit, on the 14th day of June, 1856 James Miller, brother of the said William Miller, deceased, by deed of bargain and sale duly acknowledged on the 16th day of June, 1856 and recorded in J. A. S. 117 folio 385 et seq. one of the land records of the District of Columbia, bargained and sold, granted and conveyed unto John Murphy and Nicholas Callan and to the survivor of them, his heirs or assigns, the following described real estate "that is to say, part of Lot numbered Twelve (12) and improvements, being

the west Thirty-three (33) feet six (6) inches on M Street and One hundred and ten feet deep, in Square numbered Two hundred and fourteen (214), the same being in the City of Washington, District of Columbia, together with all the right, title, interest and claim of the said James Miller in and to the same," in trust for the use and benefit of the said Joanna Elizabeth, Mary Jane, Margaret Ellen, Wilemina Miller, the said infant children of the said William Miller, then deceased. That by the provisions of the said deed it was understood and agreed that the said Mary Miller, said widow, should have and enjoy the use and occupation of the said property, and have and receive the rents and profits thereof during her natural life, and after her

4 death the said Murphy and Callan, trustees, or the survivor of them, or his heirs, should hold the said lot or parcel of land for the use of the said infant children of the said William Miller, deceased, and should convey the same to the said children, or to their heirs on their becoming at full age; and complainants aver that the said John Murphy and Nicholas Callan have long since departed this life, and that the complainants have been unable to ascertain, and do not know which of the said trustees first died, or who are the heirs of the surviving trustee, and that the said trust to convey the said real estate to the surviving children of the said William Miller, deceased, and the heir at law of the deceased child, the parties hereto, is incapable of performance without the aid and intervention of this honorable Court and the appointment of some suitable and fit person as trustee to execute a proper deed of conveyance to them for the said real estate. A duly certified copy of the said deed of conveyance from the said James Miller to the said John Murphy and Nicholas Callan, trustees, is herewith filed, marked "Complainants' Exhibit No. 1," and is prayed to be taken and read with this bill of complaint and as a part hereof.

6. That on or about the first day of May 1851 the said Mary Miller, said widow, intermarried with one John McKeon, and of this marriage two children were born, namely Eva I. McKeon, who intermarried with one John H. W. Schmidt, and Eliza Virginia McKeon, who intermarried with Wyatt A. Wren, and that the said Eva I. Schmidt and Eliza Virginia Wren are made parties defendant to this bill.

5 7. That about seven years after the marriage of the said Mary Miller, said widow, to the said John McKeon, and two years after the execution of the said deed from the said James Miller to said Murphy and Callan, trustees, to wit, on the 2nd day of July, 1858, they the said Murphy and Callan, said trustees executed a certain paper writing under their hands and seals, and acknowledged by them and recorded in Liber J. A. S. 158 at folio 40 of said land records, whereby they undertook to release and transfer to the said Mary McKeon for the nominal consideration of one dollar all the title which they, said trustees, held under the said deed to them from the said James Miller, and reciting in the said paper writing that it was then understood by the said trustees that the original conveyance

to them was erroneously made, and that the said paper writing was executed for the purpose of correcting said error, and that the said paper was executed at the request of the said James Miller, the said grantor in the said original deed, who also signed and acknowledged the said paper writing. A duly certified copy of said paper writing is herewith filed marked "Complainants' Exhibit No. 2," and is prayed to be read and considered with this bill as a part hereof.

Complainants further show to the Court that the said trustee held only the mere legal title to the said real estate charged with the execution of the trust created in the said deed, and had no substantial interest in the real estate thereby conveyed, and having accepted the office of trustee under and by virtue of the said deed for the

benefit of the infant cestui que trustents therein named, they
6 the said trustees had no power or authority in law or in equity by any instrument in writing to divest themselves of the said trust, or to release or transfer the same to any other person or persons whomsoever, and that said assignment or transfer was a breach of their said trust; or if they did have such power and the said paper writing was a valid exercise thereof, then and in that event said Mary McKeon took the legal title to the said property subject to all the uses and trusts mentioned and declared in the said deed in favor of the children of the said William Miller, deceased.

8. Complainants further aver that on the 20th day of August, 1869 the said Mary McKeon formerly Miller, by a certain writing purporting to be a deed and recorded amongst the said land records in Liber D No. 10 at folio 344 et seq. attempted to sell and convey in fee simple to her then husband, John McKeon, the east sixteen (16) feet nine (9) inches front by a depth of One hundred and ten (110) feet of the property herein described, together with the improvements thereon, to which said supposed deed the said Mary McKeon affixed her seal and signed her name by making her mark; that the said Mary McKeon had no power or authority in law or in equity to sell and convey the said property to any person or persons in fee simple, she having only the right to the use and occupation of the said property, and the rents and profits thereof during her natural life as provided in the said deed in trust; that she was incapable of conveying the said property to her said husband, and that the said paper writing purporting to be a deed was ineffectual

and inoperative to pass or convey the said property or the
7 title thereto, and for the further reason that the certificate of her acknowledgment to the said paper writing or pretended deed shows upon its face that she was not by the said Nicholas Callan, the Notary Public, before whom the acknowledgment was made, examined privily and apart from her husband, the said John McKeon, the grantee in the said deed, and that the said pretended deed was not fully explained to her and that she had not declared that she had willingly signed, sealed and delivered the same, and that she wished not to retract it. A duly certified copy of said paper writing purporting to be a deed with the said certificate of acknowledgment thereunto attached, is herewith filed marked "Complainants' Exhibit No. 3, and prayed to be read and considered as a part of this bill of complaint.

9. Complainants further show that the said Mary McKeon died in the said City of Washington on the 10th day of January, 1903, leaving her last will and testament dated January 31st, 1901 whereby she gave, devised and bequeathed to the said complainants, Margaret Ellen Jones and Elmyra M. Goodman, and to the said defendants, Mary Jane Boteler, Elizabeth Virginia McKeon, now Wren, and Eva Isabella McKeon, now Schmidt, and their heirs, as tenants in common all of her property, real personal and mixed, which said will was admitted to probate and record by the Supreme Court of the District of Columbia, holding a Probate Court on May 26th, 1904. A duly certified copy of the said will is herewith filed marked "Complainants' Exhibit No. 4" and is prayed to be taken and read with this bill and as a part hereof. That the executor nominated

8 in the said will refused to qualify as such and that there has been no administration upon her said estate.

10. That afterwards on the — day of —, 1908 the said John McKeon died in the said City of Washington, having first made his last will and testament dated August 17, 1904, whereby he devised all his property, real and personal including the said part of lot numbered Twelve (12), in square numbered Two hundred and fourteen (214), attempted to be conveyed to him by his said wife, to his two daughters, the said Eliza Virginia Wren and Eva I. Schmidt, jointly during their natural lives, and to the survivor of them during her natural life, and upon the death of the survivor to his grandson, Francis Aiken Schmidt, an infant of the age of 15 years, the son of the said Eva I. Schmidt, which said will was by the said Probate Court admitted to probate and record on the 11th day of August, 1908. A duly certified copy of said last will and testament is herewith filed, marked "complainants' exhibit No. 5," and is prayed to be taken and read with this bill as a part hereof.

11. That after the death of said Mary McKeon the said John McKeon, her husband continued to occupy the house situated on the said east 16 feet 9 inches of said property, wherein the said Mary McKeon had resided up to the time of her death, and also as agent or trustee for the female complainants and the said defendant Mary J. Boteler collected and received the rents of the west 16 feet 9 inches of said property and the house erected thereon from the tenants occupying the same up to the time of his death, and that the said rents so collected by him during the time aforesaid

9 amounted to \$13.50 per month, and that the fair rental value of that portion of the premises occupied by him as aforesaid up to the time of his death was the sum of \$20.50 per month, and that he has never accounted therefor, or paid any portion thereof to the said complainants, Elmyra M. Goodman or Margaret E. Jones, or to the said defendant Mary J. Boteler.

12. Complainants further aver that the said complainants Elmyra M. Goodman and Margaret E. Jones and the said defendant Mary J. Boteler are the only true and lawful owners in fee simple of the said real estate so conveyed by the said James Miller to the said Murphy and Callan, trustees, and that they are in possession of a part of the said real estate and that the pretended deeds from the

said Murphy and Callan to the said Mary McKeon and from the said Mary McKeon to the said John McKeon constitute and are clouds upon their title to the said part of said lot numbered Twelve (12), square Two hundred and fourteen (214), mentioned and described in the said deed of conveyance from the said James Miller to the said Murphy and Callan, trustees, (complainants' exhibit No. 1), and that the said pretended deeds of conveyance, and the wills of the said Mary McKeon and John McKeon of probate and record as aforesaid, devising and disposing of the said real estate upon the assumption of ownership in them based upon the said pretended deeds have so entangled, confused and beclouded the title of the said female complainants and the said defendant Mary Jane Boteler that it has become, and is, impossible to market or sell the said real estate for the purposes of partition and division thereof between the
 10 said children and the said grandchildren of the said William Miller, deceased, parties hereto.

12, That the said complainants, Elmyra M. Goodman and Margaret E. Jones are entitled to a partition of the said real estate mentioned and described in the fifth paragraph of this bill, and in complainants' said exhibit No. 1, filed herewith and as a part hereof; that the said real estate cannot be divided in kind between the said last named complainants and the said Mary J. Boteler without loss and injury to them, and that the only method by which partition can be made without such loss or injury will be by this Court decreeing a sale of the said real estate, and a division of the money arising from such sale amongst them in equal shares and proportions.

The premises considered the said complainants pray as follows:

Prayers.

1. That the United States Writ of Subpœna may issue out of the Clerk's office of this Court against the said defendants requiring them, and each of them, to appear and answer the exigencies of this bill of complaint, but answers under oath are hereby expressly waived.

2. That the said deeds from John Murphy and Nicholas Callan, said trustees, to the said Mary McKeon (Complainants' Exhibit No. 2) and the said deed from the said Mary McKeon to John McKeon, her husband, (Complainants' Exhibit No. 3) may by this honorable
 11 Court, be adjudged, decreed and declared to be clouds upon the title of the said complainants, Elmyra M. Goodman and Margaret E. Jones, and the said defendant Mary Jane Boteler to the said real estate so conveyed as aforesaid by the said James Miller to John Murphy and Nicholas Callan in trust for the said Mary Miller for life, and thereafter for the said complainants and said defendant in fee simple.

3. That the said deeds, said Complainants' Exhibits Nos. 2 and 3 may by this Honorable Court be adjudged, decreed and declared to be null and void in law and in equity, and be canceled, annulled, set aside and for naught held to the end that the said clouds upon the said complainants' and the said defendant, Mary J. Boteler's said title be lifted and removed, and that the title to the said real estate

be adjudged and decreed to be, and established in the said complainants, Elmyra M. Goodman and Margaret E. Jones, and the defendant Mary Jane Boteler.

4. That this Court may select and appoint a trustee in the place and stead of the said John Murphy and Nicholas Callan, deceased, to execute the said trust (Complainants' Exhibit No. 1) by conveying the real estate therein mentioned to the said Elmyra M. Goodman and Margaret E. Jones, complainants, and the said Mary J. Boteler, defendant, by good and sufficient deed in fee simple, as tenants in common of the said real estate.

5. That the said complainants, Elmyra M. Goodman and Margaret E. Jones may have partition of the said real estate mentioned in the fifth paragraph of this bill, and in the said complainants' exhibit No. 1, and that the Court may decree partition thereof between them and the said Mary Jane Boteler as tenants in common, and to that end decree a sale of the said real estate by a trustee or trustees to be appointed by the Court, and a division of the money arising from such sale among and between them according to their respective rights in equal shares and proportions.

6. That a receiver may be appointed by the Court to take charge of the said real estate and collect the rents and income arising therefrom pending the final determination of this cause.

7. That an order for the substitution of publication for personal service may be made against the said absent or non-resident defendants, Eva Isabella Schmidt and Francis Aiken Schmidt, an infant.

8. That a guardian ad litem may be appointed for the infant defendant, Francis Aiken Schmidt, to answer and defend his interest in this suit.

9. That all proper orders may be made and accounts taken herein, and that the complainants may have such other, further and general relief in the premises as the nature of the case may require and to equity seem meet.

ELMYRA M. GOODMAN,
ALFRED GOODMAN,
MARGARET E. JONES,
Complainants.

EDMUND BURKE,
Solicitor for Complainants.

The defendants to this bill are: Eliza Virginia Wren, Eva Isabella Schmidt, Francis Aiken Schmidt, Mary Jane Boteler, Orlando R. Boteler.

13 DISTRICT OF COLUMBIA, *To wit:*

I, Elmyra M. Goodman, on oath say that I have read the foregoing bill of complaint by me subscribed and know the contents thereof; that the matters and things therein contained upon my personal knowledge are true; and those stated upon information and belief, I believe to be true.

ELMIRA M. GOODMAN.

Subscribed and sworn to before me this 12 day of September, A. D. 1908.

[SEAL.]

J. WM. SHEA,
Notary Public, D. C.

14

"COMPLAINANTS' EXHIBIT No. 1."

Deed of Trust.

Recorded 18th June, 1856.

M. V. M. Liber J. A. S. 117, Folio 385.

James Miller
to
John Murphey & Nicholas Callan.

This indenture made this fourteenth day of June in the year Eighteen hundred and fifty-six by and between James Miller of the one part and John Murphey and Nicholas Callan of the other part, all of the City and County of Washington in the District of Columbia,

Witnesseth, that the said James Miller for and in consideration of the sum of One hundred dollars, current money of the United States to him in hand paid by the said John Murphey and Nicholas Callan before the ensealing and delivery of these presents, the receipt of which sum of money is hereby acknowledged, hath given, granted, bargained, and sole enfeoffed, conveyed and confirmed and by these presents doth give, grant bargain and sell enfeoff convey and confirm unto the said John Murphey and Nicholas Callan and to the survivor of them his heirs and assigns forever; the following described piece of property; that is to say, part of Lot numbered twelve (12) and improvements, being the west thirty-three feet six inches on M Street and one hundred and ten feet deep in Square numbered two hundred and fourteen (214) the same being in the City of Washington in the District of Columbia, together with all the right title interest and claim of the said James Miller in and to the same to have and to hold the same unto the said John Murphy and Nicholas Callan and to the survivor of them his heirs and assigns forever.

15 In trust nevertheless for the use and benefit of Joanna Elizabeth Mary Jane, Margaret Ellen & Wilemina, infant children of the late William Miller deceased it being distinctly understood and *and* agreed upon that * * * Mary Miller the widow of the late William Miller shall have and enjoy the use and occupation of the said property as well as the rents and profits thereof during her natural life and after the death of the said Mary Miller, the said John Murphey & Nicholas Callan or the Survivor of them his heirs shall hold the same for the use of the said infant children of the said Wm. Miller deceased and shall convey the same to the said children or to their heirs on their becoming at full age. In testimony whereof,

the said James Miller hath hereunto set his hand and seal, the day and year first hereinbefore written.

JAMES MILLER. [SEAL.]

Signed, sealed and delivered in presence of
PAUL STEVENS.
A. GREENLEAF.

DISTRICT OF COLUMBIA,
County of Washington: .

We, A. Greenleaf and Paul Stevens, Justices of the Peace in and for the County of Washington in the District of Columbia do hereby certify. James Miller a party to a certain deed bearing date the 14th day of June A. D. 1856 and hereto annexed personally appeared before us in our County aforesaid the said James Miller being personally well known to us as the person who executed the said deed and acknowledged the same to be his act and deed. Given under our hands and seals this Sixteenth day of June 1856.

A. GREENLEAF, J. P. [SEAL.]
PAUL STEVENS, J. P. [SEAL.]

OFFICE OF THE RECORDER OF DEEDS,
DISTRICT OF COLUMBIA.

This is to certify that the foregoing is a true and verified copy of an instrument as recorded in Liber J. A. S. 117, folio 385, et seq., one of the Land Records of the District of Columbia.

In testimony whereof I have hereunto set my hand and affixed the seal of this office this 4th day of September, A. D. 1908.

[SEAL.]

R. W. DUTTON,
Deputy Recorder of Deeds, D. C.

17

"COMPLAINANTS' EXHIBIT No. 2."

Deed in Fee.

Recorded 2nd July, 1858.

M. V. M. Liber J. A. S. 158, Folio 40.

Nicholas Callan & John Murphy
to
Mary McKeon.

Whereas James Miller of the City and County of Washington did by his deed of Indenture dated on the 14th day of June in the year of our Lord eighteen hundred and fifty six *did* convey to John Murphy and Nicholas Callan and to the survivor of them his heirs and assigns the following described piece of property that is to say,

part of lot numbered twelve (12) and improvements being that west thirty three feet six inches on M Street and one hundred and ten feet deep in square numbered two hundred and fourteen (214) the same being in the City of Washington in the District of Columbia, In Trust for certain purposes therein mentioned, and whereas it is now understood that the said conveyance was erroneously made to said Murphy and Callan and for the purpose of correcting said error, the said Murphy and Callan at the request of the said Miller, in evidence of which request the said Miller hath signed and sealed and acknowledged these presents and for and in consideration of the sum of one dollar to them in hand paid by Mary McKeon late Mary Miller they the said John Murphy and Nicholas Callan, do hereby release and transfer, and by these presents do release and transfer unto her the said Mary McKeon, late Mary Miller, and her heirs and assigns all the title which they the said John Murphy and Nicholas Callan held under the said deed to them from said James Miller. To
 18 have and to hold the same unto the said Mary McKeon her heirs and assigns forever. In testimony whereof the said John Murphy, Nicholas Callan, and James Miller have signed and sealed these presents this third day of February 1858.

JAMES MILLER. [SEAL.]
 JOHN MURPHY. [SEAL.]
 N. CALLAN. [SEAL.]

Signed, sealed and delivered in the presence of—

RD. BURGESS.
 A. GREENLEAF.

DISTRICT OF COLUMBIA,
Washington County:

Be it known, that on this third day of February A. D. 1858, before the subscribers, personally appears John Murphy and Nicholas Callan and James Miller, being well known to us as the persons who executed the foregoing deed, and who acknowledged the same to be their act and deed.

Given under our hands and seals this third day of February 1858.

RD. BURGESS, *J. P.* [SEAL.]
 ALBERT GREENLEAF, *J. P.* [SEAL.]

OFFICE OF THE RECORDER OF DEEDS,
 DISTRICT OF COLUMBIA.

This is to certify that the foregoing is a true and verified copy of an instrument as recorded in Liber J. A. S. 158, Folio 40, et seq., one of the Land Records of the District of Columbia.

In testimony whereof I have hereunto set my hand and affixed the seal of this office this 4th day of September, A. D. 1908.

[SEAL.]

R. W. DUTTON,
Deputy Recorder of Deeds, D. C.

19

"COMPLAINANTS' EXHIBIT No. 3."

Deed.

Recorded Aug. 20th, 1869, 2:50.

M. V. M. Liber D. No. 10, Folio 344.

Mary McKeon
to
John McKeon.

This indenture made this nineteenth day of August in the year of our Lord one thousand eight hundred and sixty nine between Mary McKeon, the wife of John McKeon of the City of Washington, D. C. of the first part, and John McKeon the husband of said Mary McKeon of same place of the second part. Witnesseth, That the said party of the first part for and in consideration of the sum of sixteen hundred dollars in lawful money of the United States to her in hand paid by the said party of the second —, at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, aliened enfeoffed released and conveyed and doth by these presents grant bargain sell, alien, enfeoff, release and convey unto the said party of the second part his heirs and assigns for ever, all that part of lot of ground in the said City of Washington, D. C. known and designated on the plat of said City as original lot numbered twelve (12) in square numbered two hundred and fourteen the part of said lot intended to be conveyed is embraced in the metes and bounds as follows, that is to say, beginning for the same on M street north at a point sixteen feet, nine inches east from the north west corner of said original lot numbered twelve thence running south one hundred and ten feet thence east sixteen feet nine inches, thence north in a
20 straight line to said M street, thence west along the line of said M Street sixteen feet nine inches to the place of beginning. Together with all the improvements, ways, easements rights, privileges and appurtenances to the same belonging or in anywise appertaining, and all the remainders, reversions, rents, issues and profits thereof, and all the estate, right, title, interest claim, and demand, either at law or in equity or otherwise however of the said part- of the first part, of, in, to, or out of the said piece or parcel of ground and premises. To have and to hold the said piece or parcel of ground and premises and appurtenances unto the said party of the second part, his heirs and assigns forever to his and their sole use, benefit and behoof forever, And the said Mary McKeon for herself her heirs, executors and administrators doth hereby covenant promise and agree to and with the said party of the second part, his heirs and assigns that she the said party of the first part and her heirs shall and will warrant and forever defend the said piece or parcel of ground and premises and appurtenances, unto the said

party of the second part, his heirs and assigns, from and against the claims of all persons claiming or to claim the same or any part thereof, by, from, under or through her them or any or either of them and further that she the said party of the first part and her heirs shall and will at any and at all times hereafter, upon the request and at the cost of the said party of the second part his heirs or assigns make and execute all such other deed or deeds or other assurance in law, for the more certain and effectual conveyance of the said piece or parcel of ground and premises and appurtenances
 21 unto the said party of the second part his heirs or assigns, as the said party of the second part his heirs and assigns, or his or their counsel learned in the law shall advise devise or require. In testimony whereof the said party of the first part hath hereunto set her hand and seal on the day and year hereinbefore written.

her
 MARY X McKEON. [SEAL.]
 mark.

(Stamps \$2.)

Signed, sealed and delivered in presence of—
 N. CALLAN.
 JNO. DANBY.

DISTRICT OF COLUMBIA,
County of Washington, ss:

I, Nichs Callan a Notary Public in and for the County aforesaid in the said District do hereby certify that Mary McKeon the wife of John McKeon party to a certain Deed bearing date on the nineteenth day of August A. D. 1869 and hereto annexed personally appeared before me in the County aforesaid the said Mary McKeon, being personally well known to me to be the person who executed the said Deed and acknowledged the same to be her act and deed.

Given under my hand and affixed seal this twentieth day of August A. D. 1869.

[SEAL.]

N. CALLAN,
Notary Public.

22

OFFICE OF THE RECORDER OF DEEDS,
 DISTRICT OF COLUMBIA.

This is to certify that the foregoing is a true and verified copy of an instrument as recorded in Liber D No. 10, folio 344, et seq., one of the Land Records of the District of Columbia.

In testimony whereof I have hereunto set my hand and affixed the seal of this office this 4th day of September, A. D. 1907.

[SEAL.]

R. W. DUTTON,
Deputy Recorder of Deeds, D. C.

23

"COMPLAINANTS' EXHIBIT No. 4."

1428 M. ST. N. W., WASHINGTON, D. C.

Know all men by these presents that I, Mary McKeon, being of sound and disposing mind and memory, do make, publish and declare this and this only to be my last will and testament, hereby revoking all former wills by me at any time made—First, I give, devise and bequeath to Mary Jane Boteler, Margaret Ellen Jones, Eliza Virginia McKeon, & Eva Isabella Schmidt, my four children and to Almira May Goodman (daughter of Wilmira Boteler deceased) my grandchild, to them and their heirs as tenants in common, share and share alike, all of my property, real personal and mixed, wherever the same may be situated—

And I nominate, constitute and appoint Francis Harvey Duehay, to be the executor of this my last will and testament and I request that no bond shall be required of him in the execution of the duties of said executor.

In testimony whereof I have hereunto set my hand this thirty first day of January A. D. 1901.

her
MARY X McKEON.
mark.

Signed, published and declared by Mary McKeon to be her last will and testament in the presence of us, who at her request and in her presence and in the presence of each other have signed the same as witnesses thereto.

Witnesses:

ALEXANDER DUEHAY.
GEORGIA A. JONES.
JOHN VAN RENSSELAER.

24

1428 M St. N. W.

I do hereby certify that the sewing machine, the bed-room set in the rear room second floor all the pictures throughout the house, and the furniture in the parlor, are the personal property of my daughter, Eliza Virginia McKeon.

Signed this thirty first day of January, 1901.

her
MARY X McKEON.
mark.

Witnesses:

ALEXANDER DUEHAY.
JOHN VAN RENSSELAER.
GEORGIA A. JONES.

Supreme Court of the District of Columbia, Holding Probate Court.

DISTRICT OF COLUMBIA, *To wit:*

I, M. J. Griffith, Deputy Register of Wills for the District of Columbia, Clerk of the Probate Court, do hereby certify, That the foregoing is a true copy of the original will and Codicil of Mary McKeon deceased, filed and recorded in the office of the Register of Wills for the District of Columbia, Clerk of the Probate Court, aforesaid; and that the said will and Codicil after having been duly proven, were, by order of the said Court, in accordance with the laws of the District of Columbia, admitted to probate and record on the 26th day of May, A. D. one thousand nine hundred and four.

25 I further certify, That said will and Codicil were duly executed and proved agreeably to the laws and usages of the District of Columbia, and that I have compared the foregoing copy of said will and Codicil with the original record in said office, and find it to be a full, true and correct transcript thereof.

Witness my hand and the seal of the said Probate Court, this 15th day of September, A. D. 1908.

[SEAL.]

M. J. GRIFFITH,
*Deputy Register of Wills for the District of
Columbia, Clerk of the Probate Court.*

26

"COMPLAINANTS' EXHIBIT No. 5."

I, John McKeon, of the City of Washington, District of Columbia, being of sound and disposing mind and capable of making a valid deed or contract, do hereby declare the following as my last will and testament, hereby revoking all other wills heretofore by me made.

First. I direct that all my funeral expenses be paid out of the money payable on my death from the Postoffice Department Immediate Benefit Association of Washington, D. C.

Second. All my pictures, furniture and household effects, I give and bequeath to my daughter, Eliza Virginia Wrenn, wife of Wyatt A. Wrenn, of Washington, D. C.

Third. My gold watch and chain, I give and bequeath to my grandson, Francis Aiken Schmidt, son of Eva Isabella and John H. W. Schmidt, of Washington, D. C., and in the event of his death before the death of my daughter, Eliza Virginia Wrenn, without disposing of the same, by will or otherwise, then it is my wish that the same be given to my said daughter, Eliza Virginia.

Fourth. I give, devise and bequeath all the rest and residue of my estate, real, personal and mixed, wheresoever situate, and already or hereafter acquired, including part of lot No. 12 in square numbered 214 in the City of Washington, District of Columbia, and my stock in the Perpetual Building Association of Washington, D. C., to my two daughters, Eliza Virginia Wrenn and Eva Isabella

Schmidt, jointly, for and during their natural lives, and to the survivor of them during her natural life, and upon the death
 27 of the survivor then to my grandson, Francis Aiken Schmidt, in fee, and should he die, leaving no issue, in the lifetime of my last surviving daughter, then in that event all my said estate is to vest absolutely and unconditionally in the survivor of my said two daughters, the income from said estate to be divided equally between my two said daughters during their natural lives, and to be enjoyed wholly by the survivor during her natural life; with power to my two said daughters, and the survivor, to sell absolutely and unconditionally any or all of my said estate, real or personal, devised by this fourth paragraph, and to invest or reinvest the proceeds in real estate so far as is practicable, the same to be held and enjoyed and to pass as hereinbefore provided for the original estate, without the purchaser being obliged to see to the application of the purchase money.

Fifth. I hereby nominate and constitute Robert McReynolds of Washington, District of Columbia, and my daughter, Eliza Virginia Wrenn, as executor and executrix, respectively, and request that they each be allowed to qualify without giving bond.

In witness whereof I have hereunto set my hand and seal at Washington, in the District of Columbia, this 17th day of August 1904.

JOHN McKEON. [SEAL.]

Signed, sealed, published and declared by the said John McKeon to be his last will and testament in our presence, who at his request, in his presence and in the presence of each other, have here-
 28 unto this 17th day of August, 1904, at Washington, in the District of Columbia, affixed our signatures as witnesses thereto.

THOS. C. HENDERSON.
 JOHN HENDERSON, JR.
 WM. G. HENDERSON.

Supreme Court of the District of Columbia, Holding Probate Court.

DISTRICT OF COLUMBIA, *To wit:*

I, M. J. Griffith, Deputy Register of Wills for the District of Columbia, Clerk of the Probate Court, Do Hereby Certify, That the foregoing is a true copy of the original will of John McKeon deceased, filed and recorded in the office of the Register of Wills for the District of Columbia, Clerk of the Probate Court, aforesaid; and that the said will, after having been duly proven, was, by order of the said Court, in accordance with the laws of the District of Columbia, admitted to probate and record on the 11th day of August, A. D. one thousand nine hundred and eight.

I Further Certify, That said will was duly executed and proved agreeably to the laws and usages of the District of Columbia, and that I have compared the foregoing copy of said will with the

original record in said office, and find it to be a full, true and correct transcript thereof.

Witness my hand and the seal of the said Probate Court, this 15th day of September, A. D. 1908.

[SEAL.]

M. J. GRIFFITH,
*Deputy Register of Wills for the District of
Columbia, Clerk of the Probate Court.*

29

Demurrer.

Filed March 5, 1909.

In the Supreme Court of the District of Columbia, Holding an
Equity Court.

No. 28056. Equity Docket.

ELMYRA M. GOODMAN et al.

v.

ELIZA V. WREN et al.

Now comes the defendant, Isabella Schmidt, by Ralston, Siddons & Richardson, her solicitors, and demurs to the original bill of complaint filed herein and says the same is bad in substance.

RALSTON, SIDDONS AND RICHARDSON,
Solicitors for Defendant, Isabella Schmidt.

I, Frederick L. Siddons, one of the solicitors for the defendant Isabella Schmidt, do hereby certify that in my opinion the foregoing demurrer of the defendant Isabella Schmidt to the bill of complaint filed herein is well founded in law.

FREDK. L. SIDDONS.

The complainants, by their solicitors, do hereby expressly waive the affidavit of the defendant Isabella Schmidt in support of
30 her foregoing demurrer usually required by Rule 28 of the Equity Rules, and hereby stipulate and agree that said demurrer shall be treated and heard and disposed of by the Court as if the affidavit of said defendant required by said Rule had been made.

EDMUND BURKE,
Solicitor for Complainants.

Opinion.

Filed May 3, 1909.

In the Supreme Court of the District of Columbia.

No. 28056. Equity.

ELMYRA GOODMAN et al., Complainants,

v.

ELIZA VIRGINIA WREN et al., Defendants.

The bill in this case avers that William Miller died in 1849, in this District, leaving Mary Miller, his widow, surviving, and four

infant children, Joanna Elizabeth, Mary Jane, Margaret Ellen, and Wilemina Miller. That Joanna Elizabeth died in 1881, intestate and without issue. That Wilemina married Wilton Boteler in 1880, and she died intestate, leaving one child, Elmyra M. Boteler, who intermarried with Alfred Goodman. That said Margaret Ellen married Edward Jones, now deceased; and Mary Jane married Orlando R. Boteler, she and her husband being made parties defendant herein, and Elmyra M. Goodman and Margaret Ellen Jones being complainants.

31 That said William Miller died seized and possessed of certain property, real and personal, and administration was had on his estate; and June 14, 1856, James Miller, a brother of said William, by deed of bargain and sale, conveyed unto John Murphy and Nicholas Callan, trustees, lot 12 in Square 214, having a frontage of 33 feet 6 inches on M Street, by 110 feet deep, said deed being in trust for the use and benefit of the four infant children of said William Miller, subject to a life estate to said Mary Miller, the widow.

That said trustees are both dead.

That said Mary Miller, the widow of William Miller, married John McKeon, May 1, 1851; and of this marriage two children were born, Eva I. McKeon, who married John H. W. Schmidt, and Eliza Virginia McKeon, who married Wyatt A. Wren; and they are both made parties defendant.

That said trustees, Murphy and Callan, July 2, 1858, undertook to annul the deed in trust to them, by executing a deed to said Mary (Miller) McKeon, reciting therein that the original conveyance to them was erroneously made, and that the deed to Mrs. McKeon was to correct that error.

The bill further avers, that the said deed so made to Mrs. McKeon was in breach of their trust; but if the same was competent to convey the title, then that she took the property as a trustee, and subject to all the provisions of the said deed of trust, in favor of the said children of said William Miller.

That August 20, 1869, said Mrs. McKeon conveyed the east half, being 16 feet 9 inches front, by the depth of 110 feet of said
32 property, to her husband, which deed they aver was inoperative because she was not examined privily and apart from her husband by the notary taking her acknowledgment, and said deed was not fully explained to her, as required by the law at that time.

That said Mary McKeon died January 10, 1903, testate, devising all her property to her said five children. That her said husband, John McKeon, died in 1908, testate, devising by his will the said east half of said lot 12 to his two daughters, Eliza Virginia Wren, and Eva I. Schmidt, and on the death of the survivor to his grandson, Francis Aiken Schmidt, an infant of fifteen years.

That said John McKeon remained in the house situated on said east half of said property after his wife's death until his own death.

Complainants aver that they, and the defendant Mary Jane Boteler, are the only lawful owners of the whole of said lot number

12; and that the several conveyances by which the other defendants claim an interest therein are invalid, and constitute clouds upon their title. That said real estate can not be divided in kind between the three parties entitled thereto, and they therefore ask for a sale for the purpose of partition.

The bill prays that the deeds from said Murphy and Callan, trustees, to said Mary McKeon, and from said Mary McKeon to said John McKeon, be decreed to be clouds upon the title; and that they be declared null and void; and that the title be adjudged and decreed to be established in the complainants, and the defendant Mary

33 Jane Boteler. That a trustee be appointed in the place and stead of said Murphy and Callan, to convey the said property to the complainants, and the defendant Mary Jane Boteler, as tenants in common; and that they may have partition thereof; and that a receiver be appointed to collect the rents and income pending this cause; and for general relief.

The defendant Isabella Schmidt (Evi I. Schmidt) has filed a general demurrer to the bill, the defendants Eliza V. Wren, and Mary Jane Boteler have answered the same. The infant defendant, Francis Aiken Schmidt, has answered by guardian ad litem.

The cause has been calendared for hearing on the said demurrer of the defendant Isabella Schmidt, and the same has been argued, and submitted.

It does not appear affirmatively from the bill that the complainants are in actual possession of any of the property sought to be partitioned. It may be assumed, however, that they are in actual or constructive possession, under the statements of the bill, of a portion of the said property.

It is admitted in argument that two of the defendants are in actual possession of the east half of said lot, claiming title thereto.

The bill does not state that James Miller, under whom the title is ostensibly claimed by complainants, had any title whatever to the said property; and it is not clear that the defendants are not claiming title from some other source. If it should prove true that Mary Miller had title to the said ground in her own right, and that the deed from James Miller to her conveyed no substantial interest, then

34 it would turn out that so far as the west half of the lot is concerned, at least, the title would go under the will of Mary Miller to her five children, to wit, the complainants, and the defendants Wren, Schmidt, and Boteler, instead of going to the two complainants and the defendant Boteler.

If the title to the property was vested in William Miller, and passed from him by descent, of course it would vest in the two complainants, and the defendant, Boteler, his only children. It therefore seems reasonably certain that the question of possession, or the right of possession, is in dispute as to the east half of the lot; and the question of title may be in dispute as to the west half. At any rate, the bill does not show any title in the complainants by virtue of the deed from James Miller, because it fails to show that James Miller had any title to the land, leaving it for the court to assume that because he made a deed of bargain and sale to Murphy

and Callan, that he had title to the property so attempted to be conveyed. The deed recites a consideration of \$100, but in effect it is only a quit-claim deed.

The Court of Appeals held, in the case of *Smith v. Cosey*, 26 Appeals D. C., 569, in effect, that where the legal title is disputed, or is not clear, a bill for partition will not be entertained.

In the case of *Moore v. Shannon*, 6 Mackey, 157, Justice Hagner held, delivering the opinion of the court, that it is a general rule prevailing in England, and throughout the majority of the United States, that no person has the right to demand any court to enforce a compulsory partition, unless he has an estate in possession, 35 one by virtue of which he is entitled to enjoy the present rents, or the possession of the property as one of the co-tenants thereof.

The court concluded its opinion with this sentence:

"Construing the statute according to the obligatory rules of construction, we have arrived at the opinion that although a tenant in common or coparcener within this District may compel partition, whether his title be legal or equitable, it is still, notwithstanding the act of 1876, indispensable to his right to institute such proceedings, that he shall be actually seized or in possession of whatever estate he may claim to be entitled to."

In respect to the question of possession, our present statute of partition, (Section 93 of the Code,) does not materially differ from the act of 1876, (19 Statutes-at-Large, 202), referred to by Justice Hagner in said case.

In the case of *Williams v. Paine*, 7 Appeals D. C., 116, (169 U. S., 55,) no decision was made as to the necessity for a complainant in a partition suit to be in possession of the property; but the case was decided against the complainant on the merits on other grounds.

By reason of the absence of any averments showing title in the complainants, and also by reason of the fact apparent from the bill, and the admissions of counsel in the argument, that two of the defendants are in actual possession of the east half of said lot, and claiming title thereto, I am disposed to allow the demurrer.

Inasmuch, however, as complainants may be able to state 36 a case that will entitle them to partition, as to the west half of said lot, they may have leave to file an amended bill, if so advised.

JOB BARNARD, *Justice*.

Order Sustaining Demurrer.

Filed May 6, 1909.

In the Supreme Court of the District of Columbia, Holding an Equity Court.

No. 28056, Equity Docket.

ELMYRA M. GOODMAN et al.

vs.

ELIZA V. WREN et al.

This cause coming on to be heard,— the demurrer of the defendant is Isabel Schmidt to the Bill of Complaint filed herein, and the

same having been argued by counsel for the respective parties, and submitted and considered, it is by the Court, this 6th day of May, 1909, Adjudged, Ordered and Decreed, That said demurrer be, and the same is hereby sustained and leave is hereby given to the complainants to amend their Bill of Complaint as they may be advised, the said amendment to be filed within ten days from the date of this order.

JOB BARNARD, *Justice.*

37

Decree Dismissing Bill.

Filed June 5, 1909.

In the Supreme Court of the District of Columbia, Holding an Equity Court.

No. 28056, Equity Docket.

ELMYRA M. GOODMAN et al.

vs.

ELIZA V. WREN et al.

It appearing to the Court that the Complainants have failed to file an amended Bill of Complaint within the ten (10) days limited in the order of this Court, dated May 6th, 1909, it is, by the Court, this 3d day of June, 1909 Ordered and Decreed, That the said Bill of Complaint be and the same is hereby dismissed with costs.

JOB BARNARD, *Justice.*

38

Order Noting Appeal.

Filed June 21, 1909.

In the Supreme Court of the District of Columbia, the 21 Day of June, 1909.

Equity. No. 28056.

ELMYRA M. GOODMAN et al.

vs.

ELIZA V. WREN et al.

The Clerk of said Court will enter an appeal on behalf of the complainants in the above entitled cause to the Court of Appeals of the District of Columbia from the final decree dismissing the complainants' bill entered herein on the 3rd day of June, 1909, and issue citation.

EDMUND BURKE,
Attorney for Complainants.

39 In the Supreme Court of the District of Columbia.

No. 28056. In Equity.

ELMYRA M. GOODMAN, ALFRED GOODMAN, MARGARET E. JONES

vs.

ELIZA VIRGINIA WREN, EVA ISABELLA SCHMIDT, FRANCIS AIKEN
SCHMIDT, MARY JANE BOTELER, ORLANDO R. BOTELER.

The President of the United States to Eliza Virginia Wren, Eva Isabella Schmidt, Francis Aiken Schmidt, George F. Havell, guardian ad litem for Francis Aiken Schmidt, Mary Jane Boteler, and Orlando R. Boteler, Greeting:

You are hereby cited and admonished to be and appear at a Court of Appeals of the District of Columbia, upon the docketing the cause therein, under and as directed by the Rules of said Court, pursuant to an Appeal entered in the Supreme Court of the District of Columbia, on the 21st day of June, 1909, wherein Elmyra M. Goodman, Alfred Goodman and Margaret E. Jones are Appellants, and you are Appellees, to show cause, if any there be, why the Decree—rendered against the said Appellants, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Harry M. Clabaugh, Chief Justice of the Supreme Court of the District of Columbia, this 23rd day of June, in the year of our Lord one thousand nine hundred and nine.

[Seal Supreme Court of the District of Columbia.]

J. R. YOUNG, *Clk.*,
By F. E. CUNNINGHAM, *Asst. Clerk.*

Service of the above Citation accepted this 23rd day of June, 1909.

RALSTON, SIDDONS AND RICHARDSON,
Attorneys for Appellee Eva Isabella Schmidt.

G. F. HAVELL,
Guardian ad Litem.

LAWRENCE HUFTY,
Atty. for Mary Jane Boteler & Orlando R. Boteler.

Without waiving any rights to object to the sufficiency of service & of appeal.

SLEMAN & LERCH,
Att'y- for Eliza V. Wren.

[Endorsed:] No. 28056. Equity. Elmyra M. Goodman et al.
vs. Eliza Virginia Wren et al. Citation.

40

Memorandum.

June 23, 1909.—Bond on appeal approved and filed.

Directions to Clerk for Preparation of Transcript of Record.

Filed July 23, 1909.

In the Supreme Court of the District of Columbia.

Equity. No. 28056.

ELMYRA M. GOODMAN et al., Complainants,

vs.

ELIZA V. WREN et al., Defendants.

The Clerk of the Court in making up the record on appeal in the above entitled cause to the Court of Appeals will include the following:

1. The original bill and exhibits.
2. Demurrer of Isabella Schmidt to original bill.
3. Order sustaining demurrer.
4. Order dismissing original bill.

EDMUND BURKE,
Solicitor for Complainants.

Memorandum.

August 3, 1909.—Time in which to file Transcript of Record in Court of Appeals extended thirty (30) days from the date hereof.

41 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, do hereby certify the foregoing pages, numbered from 1 to 40, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 28,056, Equity, wherein Elmyra M. Goodman, et als. are Complainants, and Eliza Virginia Wren, et als., are defendants, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the city of Washington, in said District, this 30th day of August, 1909.

[Seal Supreme Court of the District of Columbia.]

J. R. YOUNG, *Clerk.*
By FRED. C. O'CONNELL,
Ass't Clerk.

Endorsed on cover: District of Columbia Supreme Court. No. 2058. Elmyra M. Goodman et al., appellants, vs. Eliza Virginia Wren et al. Court of Appeals, District of Columbia. Filed Aug. 31, 1909. Henry W. Hodges, Clerk.

JAN 7 - 1910

IN THE

*Henry W. Hodges
clerk.***Court of Appeals, District of Columbia.****JANUARY TERM, 1910.****No. 2058.****ELMYRA W. GOODMAN ET AL., APPELLANTS,***vs.***ELIZA V. WREN ET AL., APPELLEES.****BRIEF FOR APPELLEES, EVA I. SCHMIDT,
FRANCIS A. SCHMIDT, GEORGE F. F. HAVELL,
GUARDIAN AD LITEM OF SAID FRANCIS A.
SCHMIDT.****J. H. RALSTON,****F. L. SIDDON,****W. E. RICHARDSON,***Attorneys for Appellees, Eva I. Schmidt,
Francis A. Schmidt, and George F. F.
Havell, Guardian ad Litem of said
Francis A. Schmidt.*

IN THE
Court of Appeals, District of Columbia.

JANUARY TERM, 1910.

No. 2058.

ELMYRA W. GOODMAN ET AL., APPELLANTS,

vs.

ELIZA V. WREN ET AL., APPELLEES.

**BRIEF FOR APPELLEES, EVA I. SCHMIDT,
FRANCIS A. SCHMIDT, GEORGE F. F. HAVELL,
GUARDIAN AD LITEM OF SAID FRANCIS A.
SCHMIDT.**

STATEMENT OF CASE.

This is an appeal from a decree of the Equity Court, dismissing the bill of complaint filed by the appellants. The decree was entered after a demurrer by the appellee, Eva I. Schmidt, to the bill of complaint had been sustained with leave to the plaintiffs to amend their bill of complaint within ten days from date of the order sustaining the demurrer. The plaintiffs did not care to avail themselves of

this leave to amend, preferring to stand upon their bill of complaint as originally framed; thereupon the decree dismissing the bill was entered.

The appellants' bill of complaint prayed that certain conveyances therein set out, should be decreed and declared to be clouds upon the title of the plaintiffs, Elmyra M. Goodman and Margaret E. Jones, and the defendant, Mary J. Boteler, to the real estate described in said bill.

It further prayed that said conveyances be declared and decreed to be null and void in law and in equity and be cancelled, annulled, set aside and for naught held, to the end that said clouds upon said title be lifted and removed, and that said title be adjudged and decreed to be and established in the said two plaintiffs and defendant mentioned above. That a trustee be appointed in the place and stead of certain former alleged trustees, to execute the alleged trust set out in the bill of complaint, by conveying the aforesaid real estate to the said two plaintiffs and the defendant by good and sufficient deed in fee simple as tenants in common. The bill further prayed that the two plaintiffs above-named have partition of the said real estate and that the court decree partition between them and the defendant Mary J. Boteler, and that for this purpose to decree a sale of all said real estate. And finally that a receiver might be appointed to take charge of said real estate and collect the rents and income arising therefrom, pending the final determination of the cause (Rec., pp. 6 and 7).

To the bill of complaint the appellee, Eva I. Schmidt, filed a general demurrer which, as stated, was sustained, and the bill dismissed.

ARGUMENT.

The argument advanced to sustain the demurrer places itself on two general grounds; first, that while the bill theoretically seeks to remove alleged clouds upon the title of the plaintiffs, and the appointment of a trustee to execute an alleged trust, the real purpose of the bill is to try a question of title to real estate and to recover in an equity suit possession of the real estate, by showing a superior title to that of the defendants, other than the defendant Mary J. Boteler. The second ground is that the plaintiffs have been guilty of laches in asserting their claim to the remedy sought by the bill of complaint. We will briefly discuss these two grounds in inverse order to that in which they are stated above.

According to the allegations of the bill of complaint, Mary McKeon, the mother of the plaintiff Margaret E. Jones and the defendants Eliza V. Wren, Eva I. Schmidt and Mary J. Boteler, acquired a certain interest in the property by virtue of the conveyance in trust set out in paragraph 5 of the bill on the 16th day of June, 1856, and that later on, to wit: July 2, 1858, the trustees under the conveyance in trust, together with the grantor in that instrument, undertook to vest this lady with the complete title to the property. This later conveyance is attacked as invalid. The trust conveyance referred to provides that the real estate conveyed thereby was to be held by the trustee therein, in trust for the use and benefit of Joanna E., Mary Jane, Margaret Ellen, and Wilemina Miller, the four children of the said Mary McKeon by her first husband, William Miller; the appellees Eva I. Schmidt and Eliza V. Wren being her children by her second husband. Of the four children by her first husband, the plaintiff Margaret E. Jones is one and the defendant Mary Jane Boteler is another. Her child Joanna E. died in 1881, intestate and without issue, and her child Wilemina Miller died intestate

in 1880, having first married, and her only heir at law is the plaintiff Elmyra M. Goodman. According to the allegations of paragraph 3 of the bill of complaint, Mrs. McKeon's four children, by her first husband, were born as follows: Her child Joanna E. was born in 1842, her daughter Mary Jane in 1845, her daughter Margaret in 1847, and her daughter Wilemina M. was born in 1850. The months and days of their respective births are not stated, but giving them the benefit of every doubt, we will assume that each was born on the last day of the last month of the year of her respective birth as alleged in the bill of complaint. This being so, the eldest daughter became twenty-one years of age on December 31, 1863, the next, Mary Jane, on December 31, 1866, the third, Margaret E., on December 31, 1868, and the youngest daughter Wilemina on December 31, 1871. The year of the birth of the plaintiff, Elmyra M. Goodman, the only heir-at-law of Wilemina, is not given, but her mother died according to the allegations of the bill, in 1880, hence, at the date of the filing of the bill of complaint, September 23, 1908, this plaintiff must have been at least twenty-eight years of age. The so-called release from the trustees and their grantor, to Mrs. Mary McKeon, which the bill alleges the trustees had no legal right to make, was made and executed over fifty years before the bill of complaint was filed. The deed from Mrs. McKeon to her husband of a part of the real estate, as set out in paragraph 8 of the bill of complaint, was executed August 18, 1869, and recorded the next day, a period of more than thirty-nine years before the bill of complaint was filed. The youngest of Mrs. McKeon's four children by her first husband lived for nine years after attaining the age of twenty-one, and died, as stated, in 1880, nineteen years after her mother conveyed said portion of the real estate to her stepfather and twenty-two years after the deed of release from the trustees mentioned above. Mrs. McKeon, the mother, died on January 10, 1903, nearly six

years before the bill of complaint was filed, and her second husband, John McKeon, the father of the appellees Eliza V. Wren and Eva I. Schmidt, died some time during the year in which the bill of complaint was filed. Mrs. McKeon left a will, in which she devised to all of her living children and to her grandchild, Elmyra M. Goodman, all her property, and her will was admitted to probate and record by the Supreme Court of the District on May 26, 1904. The bill alleges, paragraph 5, that the trustees under the above-mentioned conveyance in trust have long since died and that the plaintiffs have been unable to ascertain and do not know which of the trustees first died or who the heirs of the surviving trustee are. No allegation is made as to whether James Miller, the grantor in the conveyance in trust, is dead, but it may safely be presumed that he is.

We find the plaintiffs waiting until every one who was a party to the original transaction and to the conveyances which are attacked has died, so that neither the appellees nor the court can have the advantage of their testimony to combat or explain the claims set up in the bill of complaint. One of the plaintiffs, Margaret E. Jones, waits nearly forty years after reaching her majority before complaining of the action of the trustees in conveying the property to her mother, in alleged violation of their trust obligation, and the defendant Mary J. Boteler waits forty-two years after reaching her majority. The plaintiff Elmyra M. Goodman, the granddaughter of Mrs. McKeon, waits for at least seven years after attaining her majority before making any complaint. And if they seek to justify their non-action by saying that they were not bound to proceed until their mother died, nevertheless they waited a period of five years after her death before asserting the claim for relief against the appellees Eliza V. Wren and Eva I. Schmidt. Do not these facts present a case of laches? It seems clear to us that they do.

Taking up now the first-mentioned ground of demurrer,

we assert that as a bill for partition the bill is bad for the following reasons:

The plaintiffs claim title through the conveyance in trust from James Miller, set out in paragraph 5 of the bill of complaint (Rec., pp. 2 and 3), and a certified copy of this instrument is found on pages 8 and 9 of the record. Examination of that document discloses that it contains no warranties of title or of any other kind, but is, as the court below characterized it (Rec., p. 19), in effect "only a quit-claim deed." The bill alleged no title in James Miller at the time he made this conveyance or that he was in possession of the property described therein. This, we submit, was essential in order to maintain a suit for partition.

Walker *vs.* Lyon, 6 Appeals D. C., 484.

30 Cyc., 216, partition G, par. 5, note 10, and cases cited.

Century Digest, vol. 38, pp. 169 and 170, par. 155 (c), (m), (p).

Again it is perfectly clear that the plaintiffs are not in possession of all the property which they seek to have partitioned, and although the bill alleges that they are in possession of a part of the said real estate (Rec., p. 5), it nowhere is expressly alleged nor does it affirmatively appear which part this is. But it is clear that the appellees, other than the Botelers, are in possession of the east 16' 9" of the lot, claiming title thereto. This was admitted by the appellants at the oral argument in the court below (Rec., p. 18).

This east portion of the land is the part conveyed to John McKeon in 1869 by his wife, the mother of some of the appellees, including Mrs. Schmidt, for whom this brief is written, in 1869, and the bill alleges that after Mrs. McKeon's death, in 1903, her husband "continued to occupy the house situated on it." The bill also alleges that Mr. McKeon, "as agent or trustee for the female plaintiffs and the said defendant, Mary J. Boteler, collected and received

the rents of the west 16' 9" of said property and the house erected thereon," which is the remainder of the property in suit, but never accounted therefor or paid any portion thereof to them. This he did for the four years that he survived his wife, but these claimants never seem to have objected to his course until he was in his grave.

That John McKeon claimed the east portion of the land as his own is also made clear by the terms of his will (Rec., pp. 14 and 15), which was duly probated August 11, 1908, whereby he expressly devised it to his two daughters, Eliza V. Wren and Eva I. Schmidt, two of the appellees, jointly, for and during their natural lives, and to the survivor during her natural life and upon her death to his grandson, the appellee Francis A. Schmidt.

That the appellants are seeking in this equity suit to recover possession of the real estate involved, or at least a part of it, is also shown by the prayer of their bill for the appointment of a receiver—

"to take charge of the said real estate and collect the rents and income arising therefrom pending the final determination of this cause."

They surely do not want a receiver to take charge of that portion of which they are in possession. It must, therefore, be the remaining part that they would have the receiver take charge of and collect the rents and income arising therefrom, the part in the possession of the appellees Mrs. Wren and Mrs. Schmidt, who are claiming it as their own.

It is reasonably clear from the bill that Mrs. Wren and Mrs. Schmidt also claim an interest and title in the western portion of the land.

Their mother certainly did from 1858, when she received the conveyance from the trustees, Murphy and Callan, and James Miller, the grantor in the previous conveyance in trust; and by her will when she died, in 1903, she devised all her property to them and her two surviving daughters by her

first husband, and to her grandchildren, Elmyra M. Goodman, the only child of her dead daughter, Wilemina, equally as tenants in common in fee.

Under these circumstances and upon the authority of such cases as

Moore *vs.* Shannon, 6 Mackey, 157;

Rooler *vs.* Clark, 19 App. D. C., 539-545, affirmed in 199 U. S., 541;

Smith *vs.* Cosey, 26 App. D. C., 569, 573,

the judgment of the court below should be affirmed.

Respectfully submitted,

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